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In the Supreme Court of the United States

OCTOBER TERM 1930.

No. 453.

THE EAST OHIO GAS COMPANY,
Appellant,

vs.

THE TAX COMMISSION OF OHIO, *et al.*,
Appellees.

REPLY BRIEF OF APPELLANT.

THE INTERSTATE MOVEMENT CONTINUES TO CONSUMERS' APPLIANCES.

When the States of Ohio and Pennsylvania attacked in this Court a statute of West Virginia requiring natural gas companies in that state to satisfy local demands before transporting gas from the state, they urged upon this Court this position:

> "The course of the gas from the well to the *ultimate consumers* in Pennsylvania and Ohio is determined by existing contract relations, public service duties in other States, long-established courses of business and the physical structures adapted thereto. *The gas that goes into other States is actually in interstate commerce from the time it leaves the wells until it reaches the ultimate consumers. United Fuel Gas Co. v. Hallanan*, 78 W. Va. 396; 257 U. S. 277; *Pennsylvania Gas Co. v. Public Service Comm.*, 252 U. S. 23."

Pennsylvania v. West Virginia, 262 U. S. 553, 556.

Having succeeded in retaining a full supply for Ohio on that theory the state now takes the position that while the interstate movement continues in Ohio an average distance of approximately 120 miles, it ceases when the gas enters the distribution systems of the municipalities served.

Although no sale is there made and no change in title or possession or interruption of the continuity of the movement there occurs, the state claims that by analogy certain things may be supposed to have there occurred that in fact do not occur.

It is suggested that this Court hold "that metaphorically the package is broken." (Brief, 17.) This is an admission that the fact is otherwise.

The case which is referred to as the "leading case" for the application of the original package doctrine to natural gas, to-wit, *State ex rel. v. Flannelly*, 96 Kan. 372, 152 Pac. 22, was a part of the history of *Public Utilities Commission v. Landon*, 249 U. S. 236. (See *Landon v. Commission*, 242 Fed. 658, 665.) Both the *Flannelly* case and the applicability of the original package doctrine were urged upon this Court in the *Pennsylvania Gas case*, 252 U. S. 23, but were properly ignored in the opinion. Likewise the three Pennsylvania lower court decisions cited (Brief, 16) were before this Court in *Peoples Gas Co. v. Commission*, 270 U. S. 550, and were not followed. Thus the applicability of the original package doctrine has repeatedly been urged upon this Court without success.

The case of *Gas Co. v. Towers*, 134 Md. 137, 106 Atl. 265 (Brief, 16) was decided prior even to the decision of this Court in the *Landon* case.

Galloway v. Bell, 11 F. 2nd 558 (Certiorari denied 271 U. S. 666) merely held that gas supplied by one company to another across the District of Columbia boundary was interstate commerce and said in the paragraph quoted by

the Appellees (Brief, 16) that the "federal authorities," meaning the district commission and courts, had nothing to do with the relations between the Maryland Company and its Maryland consumers.

Again, it is suggested that processing be considered to have occurred in the distribution systems because of reductions in pressure. If East Ohio were to contract with a single industry in Cleveland to furnish its requirements of natural gas and were then to lay a pipe line direct to its factory from a producing well in West Virginia, there would be no doubt that the movement of that gas is interstate from beginning to end and the receipts from its sale, receipts from interstate commerce. It is, however, not commercially feasible to do this. In place of thousands of such separate lines East Ohio has combined all of these lines for purposes of economical transportation from West Virginia to the municipalities served, but the essential nature of the transaction remains precisely the same. The pressure is first increased in West Virginia where it enters the large transmission lines and is then reduced in Ohio for purposes of distribution and economical consumption. But there is no change in the nature of the product. It ends as it begins; gas in its natural state. The only operation that remotely resembles processing is the extraction of gasoline vapors which occurs in West Virginia. (R. 28)

Again, we are asked to assume that a gas distributing system is a warehouse or storage tank. Storage of natural gas has never been practicable. The quantities required and the price at which it is sold are such that storage reservoirs or tanks have never been employed in the industry. In *Atlantic Coast Railway Co. v. Standard Oil*, 275 U. S. 257, not only did storage actually take place in seaboard tanks for a period of thirty to ninety days, but the seaboard storage points were the only places of destination contemplated by the parties and their contracts

at the time the oils started their interstate movement. Such a case has no application here where the gas is transported to Cleveland and other communities for immediate and direct delivery to consumers in fulfilment of obligations previously incurred. The agreed facts are that the gas is constantly moving from transmission lines into high pressure distribution lines, from these into low pressure distribution lines and from these through service lines into consumers' appliances. (R. 31.) The only gas not in movement in the entire system is insignificant quantities in service lines at such times, and at such times only, as all of a consumer's appliances are shut off. (R. 31.) Since nearly all of them have hot water tanks this rarely occurs. Gas in constant movement to its destination is not in storage.

To apply any one of these analogies is to deny that interstate commerce is a "practical conception" determined by the "essential character of the movement" and to substitute fiction for fact.

Finally, it is claimed that there is a commingling of the imported gas in such fashion as makes it impossible to determine with accuracy the gross receipts from its sale and further indicates that the interstate movement has ended. Of course this argument cannot be made as to a large part of the receipts. Youngstown, Warren, Canton, Massillon and other municipalities are served entirely with West Virginia gas except for insignificant quantities of Ohio gas in Canton and Massillon during the year 1929. (R. 29, 36 and 37.) Any argument as to the effect of commingling can at most be applicable only to gas served in Akron and in Cleveland and nine of its suburbs. (R. 37.)

Cleveland and these nine suburbs have interconnected distribution systems. The Ohio and West Virginia gases carried by separate transmission lines are introduced into the distribution system and measured at the time of their

introduction by border meters. (R. 37.) Yearly receipts are then apportioned on the basis of the yearly amounts of the two gases introduced into the distribution system. While there is some difference in the sliding scale rate structures in effect in these municipalities the average price per thousand cubic feet "is practically the same." (R. 38.) The Akron receipts are apportioned in the same way on the basis of border meter readings.

It would thus seem that there is an unquestionably accurate separation of receipts in Akron and for all practical purposes an accurate separation in the Cleveland district. The detailed figures showing the exact results of applying these methods are fully set forth in the record. (R. 36-39.) All service and minimum charges were everywhere treated as intrastate receipts and the tax thereon paid. (R. 36, 38.)

As to the effect of the commingling upon the interstate movement, that question has several times been before this Court and it has uniformly held that the introduction of local gas or oil into an interstate stream does not affect the interstate character of the movement where the amounts of each are known.

Peoples Natural Gas Co. v. Public Service Commission, 270 U. S. 550, in which Mr. Justice Van Devanter said, page 554:

> "As respects the Pennsylvania gas we think it must be held to be in intrastate commerce only. Feeding it into the same pipe lines with the West Virginia gas works no change in this regard. Of course after the commingling the two are undistinguishable. But the proportions of both in the mixture are known and that of either readily may be withdrawn without affecting the transportation or sale of the rest. So for all practical purposes the two are separable, and neither affects the character of the business as to the other. *Eureka Pipe Line Co. v. Hallanan*, 257 U. S. 265; *United Fuel Gas Co. v. Hallanan*, 257 U. S. 277, 281.

And see *Hallanan v. Eureka Pipe Line Co.*, 261 U. S. 393; *Hallanan v. United Fuel Gas Co.*, 261 U. S. 398."

Moreover if it were true that no accurate separation could be made, the question then arises as to the validity of the Ohio tax in its entirety. Where separation is possible, as we think it clearly is here, the Court will only enjoin that part of the tax imposed on interstate receipts. Where, however, separation is impossible the tax in its entirety is invalid.

Ratterman v. Western Union Telegraph Co., 127 U. S. 411;

Bowman v. Continental Oil Co., 256 U. S. 642, and cases therein cited;

Hallanan v. Eureka Pipe Line Co., 261 U. S. 393.

SALES BY EAST OHIO TO CONSUMERS INCLUDED AS PART OF INTERSTATE COMMERCE.

This Court in many cases has held that where as a practical matter a movement is essentially one in interstate commerce there is included as a part of it the contract of purchase at the beginning,

Lemke v. Farmers Grain Co., 258 U. S. 50;

Shafer v. Farmers Grain Co., 268 U. S. 189;

Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282;

and the contract of sale at the end.

Bowman v. Continental Oil Co., 256 U. S. 642;

Public Utility Commission v. Landon, 249 U. S. 236;

Missouri v. Kansas Gas Co., 265 U. S. 298.

Necessarily the Court decided that same question in *Pennsylvania Gas Co. v. Public Service Commission*, 252 U. S. 23. The question there was the right of the state to regulate the price the local consumer must pay to the local

distributing company. If that price was a part of interstate commerce, as the Court there held, it became in the hands of the gas company receipts from interstate commerce. Doubtless in that case the consumer did not care whether his gas came from New York or Pennsylvania and the case did not turn upon any question of whether the contract specified gas from out the state.

The Appellees, however, urge the applicability of the following cases:

Ware and Leland v. Mobile County, 209 U. S. 405;
Banker Bros. Co. v. Pennsylvania, 222 U. S. 210;
U. S. F. & G. Co. v. Kentucky, 231 U. S. 394;
Blumenstock Bros. Adv. Co. v. Curtis Publishing Co., 252 U. S. 436;
Moore v. United States Cotton Exchange, 270 U. S. 593.

The principle of these cases is illustrated by a broker in the business of executing orders on an exchange that may result in contracts between citizens of different states and may be performed by an interstate movement of merchandise. The contracts neither require nor do they or the course of business contemplate that there will be any interstate transmission of merchandise or intelligence. If they did contemplate such an interstate movement the function of the broker is purely incidental to it and the licensing of such a broker without any direct effect upon interstate commerce. Even where a state tax is measured in part by the commissions received by such broker, there is no direct burden on interstate commerce nor is the tax in any way measured by the receipts of that commerce.

In *Banker Bros. Co. v. Pennsylvania, supra*, the automobile had been shipped from out the state to the vendor and had come to rest in his place of business before delivery under his contract with the vendee.

COMMENT ON OTHER MATTERS.

As a conclusion the Appellees point out what are alleged to be the deplorable consequences to the State of Ohio if it cannot impose such a tax as that in question. All that is said in favor of such a tax could be said with equal propriety in favor of a tax on the gross receipts of some other form of transportation beginning or ending in Ohio. Such a tax is not justified merely because it is a fair tax and is levied without discrimination upon the receipts of both intrastate and interstate business.

If, as the Attorney General supposes, distribution of natural gas and electricity in the future should be in the hands of large companies operating in many states, the appropriate and indicated method of their control will lie not by action of the separate states but by action of the federal government. A great system of natural gas transportation and distribution cannot be effectively regulated by the independent action of each state influenced by its own selfish point of view. The larger such a system becomes the more imperative becomes the need of control by Congress.

But if the Attorney General's position is here sustained and it is held that the business of local distribution is no part of an interstate movement regulation by Congress will be impossible. As the law now stands the state may regulate local distribution until Congress sees fit to occupy the field. If the time comes that the whole business becomes national in character and scope Congress can take over the task.

Indeed, precisely that evolution has occurred in the case of other utilities. The Interstate Commerce Commission was not given control over telephone and telegraph companies until 1910. Extensions of its jurisdiction are constantly under consideration. When the time comes in

the natural gas industry, which the Attorney General prophesies, effective regulation will be national and not state.

With entire deference to the views of the Attorney General we respectfully suggest that it is much more important to the State of Ohio that the power to regulate rates and other matters connected with the distribution of electricity and gas be preserved to the federal government than it is for the state to establish the right to levy a tax on the gross receipts of this business.

In the original brief we neglected to point out the statutes of Ohio that make necessary injunctive relief. These provide that excise taxes shall be paid on December 15th of each year; that upon failure to pay the same on that date they shall become a lien on all real and personal property in Ohio; that the Secretary of State shall cancel the articles of incorporation of any company failing to pay the same within a certain time after the same is certified to him by the Tax Commission as delinquent; that the Attorney General may procure an injunction in the courts of Ohio against a company continuing to do business in this state that has failed to pay its excise tax and impose other burdens and penalties upon any company failing to comply with the statute, all of which are more specifically pleaded in the bill. (R. 8 and 9.)

In the Agreed Statement of Facts it is recited that the defendants will unless restrained "exercise the powers respectively conferred upon them by the statutes of the State of Ohio" to collect all taxes and penalties for the years in question. (R. 39)

In addition averment and proof is made that East Ohio owns real estate in Ohio and that the lien will become a cloud upon its title. (R. 2, 27.) *Ohio Tax Cases*, 232 U. S. 576.

Since there is no dispute as to the amount of the tax the judgment of the lower Court should be reversed and an injunction granted in accordance with the prayer of the petition.

Respectfully submitted,

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